SUPREME COURT, U.S.
FILED
FEB 24 1993
OFFICE OF THE CLERK

No. 92-1294

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS H. THORNER, et al.,

Cross-Petitioners,

v.

WYNEMA ANNA CROSS, EXECUTRIX, et al.,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION

STAN P. DOYLE
JAMES C. THOMAS
DOYLE & HARRIS
P.O. Box 1679
Tulsa, Oklahoma 74101
(918) 743-1276
Counsel for Kothe & Eagleton, Inc.

JACK L. MCNULTY
THOMAS M. AFFELDT
SAVAGE, O'DONNELL, SCOTT, MCNULTY, AFFELDT & GENTGES
601 S. Boulder, Suite 1100
Tulsa, Oklahoma 74119
(918) 599-9000
Counsel for E.M. Kunkel

B. HAYDEN CRAWFORD
Counsel of Record
ROBERT L. BAINBRIDGE
KYLE B. HASKINS
CRAWFORD, CROWE & BAINBRIDGE, P.A.
15 East Fifth St., Suite 1714
Tulsa, Oklahoma 74103-4365
(918) 587-1128
Counsel for Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr., and Cross and Company

WALTER A. STEELE
WHITE AND STEELE, P.C.
1225 17th Street, Suite 2800
Denver, Colorado 80202
(303) 296-2828
Counsel for E.M. Kunkel

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Jurisdiction	1
Statement of the Case	2
Reasons for Denying the Writ	3
I.	
THE TENTH CIRCUIT'S APPLICATION OF CONSTRUCTIVE KNOWLEDGE TO COMMENCE THE SECTION 9(e) LIMITATION PERIOD IS CONSISTENT WITH ALL OTHER CIRCUITS	3
II.	
THE CROSS-PETITION DEMONSTRATES NO CONFLICT AMONG THE CIRCUITS, IS BASED PRIMARILY UPON FACTUAL ISSUES AND PRESENTS NO IMPORTANT FEDERAL OR CONSTITUTIONAL ISSUES REGARDING THE TENTH CIRCUIT'S DETERMINATION OF INQUIRY NOTICE UNDER SECTION 9(e)	10
A. There Is No Conflict Among the Circuits	10
B. Cross-Petitioners' Second Question Is Based Primarily Upon Factual Issues Fully Considered by the Tenth Circuit	11
C. No Important Federal or Constitutional Issues Are Presented	14

III.

THE DECISION OF THE TENTH CIRCUIT WITH RESPECT TO EQUITABLE ESTOPPEL IS NOT CONTRARY TO, NOR IN CONFLICT WITH, DECISIONS OF THIS COURT OR OTHER CIRCUITS 17

Conclusion 21

TABLE OF AUTHORITIES

Cases	Page
Alcorn v. Burlington N. R.R., 878 F.2d 1105 (8th Cir. 1989)	5
Aldrich v. McCulloch Properties, 627 F.2d 1036 (10th Cir. 1980)	17
Alexander v. Beech Aircraft, 952 F.2d 1215 (10th Cir. 1991)	5
Arneil v. Ramsey, 550 F.2d 774 (2d Cir. 1977)	10, 11
Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355 (1962)	16
Azalea Meats v. Muscat, 386 F.2d 5 (5th Cir. 1967)	5
Berry Petroleum v. Adams & Peck, 518 F.2d 402 (2d Cir. 1975)	11
Black, Sivalls & Bryson v. Keystone Steel Fabrication, 584 F.2d 946 (10th Cir. 1978)	15
Bohus v. Beloff, 950 F.2d 919 (3d Cir. 1991)	5
Bomba v. W. L. Belvidere, Inc., 579 F.2d 1067 (7th Cir. 1978)	18
Brady v. Southern Ry. Co., 320 U.S. 476 (1943)	15
Branson v. Wirth, 84 U.S. (17 Wall.) 32 (1872)	20
Briskin v. Ernst & Ernst, 589 F.2d 1363 (9th Cir. 1978)	7
Cerbone v. Int'l Ladies' Garment Workers' Union, 768 F.2d 45 (2d Cir. 1985)	17
Chrysler Corp. v. Brown, 441 U.S. 281 (1979)	8
Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102 (1980)	8
Curry v. A. H. Robins Co., 775 F.2d 212 (7th Cir. 1985)	15

Deery v. Cray, 72 U.S. (5 Wall.) 795 (1866) 20

Duncan v. Leeds, 742 F.2d 989 (6th Cir. 1984) .. 6

Ebrahimi v. E. F. Hutton & Co., 852 F.2d 516 (10th Cir. 1988) 7

Eldred v. Bell Tel. Co., 119 U.S. 513 (1886) ... 20

English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988) .. 17

First Nat'l Bank of Bowie v. Fidelity & Cas. Co., 634 F.2d 1000 (5th Cir. Unit A Jan. 1981) ... 7

Gaudin v. KDI Corp., 576 F.2d 708 (6th Cir. 1978) 11

Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959) 17, 18, 20

Goldenberg v. Bache & Co., 270 F.2d 675 (5th Cir. 1959) 6

Hauman v. Illinois Power Co., [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,882 (C.D. Ill. 1991) 8

Hupp v. Gray, 500 F.2d 993 (7th Cir. 1974) 11

Jensen v. Snellings, 841 F.2d 600 (5th Cir. 1988) .. 5

Jones v. Ford Motor Co., 599 F.2d 394 (10th Cir. 1979) 11

Katz v. Amos Treat & Co., 411 F.2d 1046 (2d Cir. 1969) 18

Kennedy v. Tallant, 710 F.2d 711 (11th Cir. 1983) .. 11

Klein v. Bower, 421 F.2d 338 (2d Cir. 1970) ... 7

Kramas v. Sec. Gas & Oil, 672 F.2d 766 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982) 16

Kropinski v. World Plan Executive Council, 853 F.2d 948 (D.C. Cir. 1988) 5

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. ____, 111 S.Ct. 2773 (1991) . *passim*

Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) 15, 16

NLRB v. Allied Prod. Corp., 548 F.2d 644 (6th Cir. 1977) 5

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) .. 16, 20

Neely v. Martin K. Eby Constr., 386 U.S. 317 (1967) 15, 16

Norris v. Wirtz, 818 F.2d 1329 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987) 6

Owens v. White, 380 F.2d 310 (9th Cir. 1967) ... 6

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 14

Rivera-Muriente v. Agosto-Alicea, 959 F.2d 349 (1st Cir. 1992) 5

Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979) 10, 11, 14, 16

Rosenberg v. Hano, 121 F.2d 818 (3d Cir. 1941) .. 5

SEC v. Seaboard Corp., 677 F.2d 1301 (9th Cir. 1982) 18

Sade v. Northern Natural Gas Co., 483 F.2d 230 (10th Cir. 1973) 6, 7

Samples v. Ryder Truck Lines, 755 F.2d 881 (11th Cir. 1985) 5

Santos v. Dist. Council of New York City, 619 F.2d 963 (2d Cir. 1980) 5

Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 501 U.S. ____, 111 S.Ct. 2887 (1991) 19

Summer v. Land & Leisure, 664 F.2d 965 (5th Cir. Unit B Dec. 1981), *cert. denied sub nom. Arthur Young & Co. v. Summer*, 458 U.S. 1106 (1982) 18

Talmadge v. United States Shipping Board, 54 F.2d 240 (2d Cir. 1931) 7

Trotter v. Int'l Longshoremen's and Warehousemen's Union, 704 F.2d 1141 (9th Cir. 1983) .. 4

Tull v. United States, 481 U.S. 412 (1987) 15

United States v. Johnston, 268 U.S. 220 (1925) .. 14, 20

United States v. Kubrick, 444 U.S. 111 (1979) ... 7

United States v. Merriam, 263 U.S. 179 (1923) .. 8

Volk v. D. A. Davidson & Co., 816 F.2d 1406 (9th Cir. 1987) 7

Walck v. American Stock Exchange, 687 F.2d 778 (3d Cir. 1982), *cert. denied*, 461 U.S. 942 (1983) 5, 6

Werner v. Satterlee, Stephens, Burke & Burke, 797 F. Supp. 1196 (S.D.N.Y. 1992) 8

Statutes Involved

The Securities Act of 1933
Section 13 (15 U.S.C. §77m) 18

The Securities Exchange Act of 1934
Section 9(e) (15 U.S.C. §78i(e)) ..... *passim*
Section 10(b) (15 U.S.C. §78j(b)) 2, 4, 10, 14
Section 27A (15 U.S.C. §78aa-1) 1, 2

Other Authorities

Supreme Court Rule 13.5 1

H. Bloomenthal, SECURITIES LAW HANDBOOK, (1991-92 ed.) 6, 19

L. Loss, FUNDAMENTALS OF SECURITIES REGULATIONS, (2d ed. 1988) 6

5A J. Moore, J. Lucas, MOORE'S FEDERAL PRACTICE, (2d ed. 1992) 16

78 Cong. Rec. 8198 (1934) 9

No. 92-1294

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS H. THORNER, et al.,

Cross-Petitioners,

v.

WYNEMA ANNA CROSS, EXECUTRIX, et al.,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION

JURISDICTION

Review of the Section 9(e) issues is not appropriate until this Court first considers the constitutionality of Section 27A.[1] Cross-Petitioners, however, argue that if certiorari is granted,[2] this Court should consider the Section 9(e) and estoppel issues prior to consideration of the constitutionality of Section 27A. Their argument is defective because it ignores the fact that the Tenth Circuit, after the

[1] 15 U.S.C. §78i(e), 15 U.S.C. §78aa-1.

[2] Rule 13.5 provides that a cross-petition which would otherwise be untimely will not be "granted unless a timely petition for a writ of certiorari of another party to the case is granted."

enactment of Section 27A, applied the Oklahoma two-year limitation period to reinstate the judgments being appealed and did not apply Section 9(e).

If Section 27A is held to be constitutional, Cross-Petitioners' Section 9(e) issues are moot. Only if Section 27A is held unconstitutional by this Court would the Section 9(e) issues, as applied by *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ____, 111 S.Ct. 2773 (1991), be ripe for review. In any event, the constitutionality of Section 27A is a threshold consideration. Proceeding as Cross-Petitioners suggest would require this Court to render an advisory opinion, contrary to the constitutional limitation of Article III to decide only cases and controversies.

STATEMENT OF THE CASE

This counter-statement is necessary to provide an understanding of the issues before this Court.

Cross-Petitioners erroneously assert that the Tenth Circuit's decision pertaining to "inquiry notice" was based as a matter of law on the SEC enforcement action. (Cr. Pet. 12)[3] To the contrary, the Tenth Circuit found, as a matter of law (App. 43a), that the investors in the 1970, 1971 and 1972 POCs, more than one year before their Section 10(b) claims were filed, were placed on inquiry notice by the following events: (1) on February 10, 1971, the SEC sued Home-Stake for fraud (App. 26a); (2) on February 16, 1971, the SEC fraud action was reported in the

[3] "Cr. Pet." citations refer to the Cross-Petition for Writ of Certiorari filed in this case. "App." citations refer to the Appendix to the Petition in *Dennler v. Trippet*, No. 92-1003, filed by the Cross-Petitioners here.

Wall Street Journal (App. 27a); (3) on April 30, 1971, the court-ordered rescission offer, which described the SEC fraud action, was mailed to the 1970 participants (App. 27a); (4) the 1971 and 1972 prospectuses described the SEC fraud action (App. 43a n. 36); and (5) the 1970, 1971,[4] and 1972 class representatives, all of whom were sophisticated investors, admitted knowledge of these facts. (App. 43a-46a)

REASONS FOR DENYING THE WRIT

The Cross-Petition is primarily a brief on the merits rather than a petition setting forth reasons for issuing a writ of certiorari. Therefore, Cross-Respondents believe it to be necessary, to some extent, to respond accordingly.

I.

THE TENTH CIRCUIT'S APPLICATION OF CONSTRUCTIVE KNOWLEDGE TO COMMENCE THE SECTION 9(e) LIMITATION PERIOD IS CONSISTENT WITH ALL OTHER CIRCUITS.

Cross-Petitioners argue that the Tenth Circuit's interpretation of Section 9(e), requiring investors to commence an action "within one year of the date when the investor knows, *or should have known*, of the facts constituting the violation" conflicts with this Court's decision in *Lampf*. They also argue, inaccurately, that the interpretation of Section 9(e) to allow constructive discovery conflicts with decisions of other courts of appeals, district courts, and

[4] Warren, the 1971 class representative, invested in all the Home-Stake programs from 1964-1972, sold two units back to Home-Stake under his buy-back agreement in 1966 and 1967, and in 1971 received and rejected the Rescission Offer.

the "legislative history and plain language of Section 9(e)." (Cr. Pet. 4)

Cross-Petitioners' contention that the one-year period begins to run from the date of actual discovery is based upon a misreading of this Court's decision in *Lampf*. In *Lampf*, this Court stated that the one-year period in Section 9(e) "begins after discovery of the facts constituting the violation." 111 S.Ct. at 2782. This statement simply recites the operative terms of the statutory language. Cross-Petitioners, however, erroneously contend that this language constitutes a holding that the Section 9(e) limitation period does not commence until *actual* discovery has occurred.

Cross-Petitioners would abolish the one-year limitation created by Section 9(e) absent specific proof of the state of mind of the persons alleging injury. Using the subjective *actual discovery* standard rather than the objective *constructive discovery* standard, the Cross-Petitioners convinced the district court and a jury that the class representatives had not "discovered" their Section 10(b) claims until *September, 1973*, even though those claims had been filed in *March, 1973*. The absurdity of Cross-Petitioners' argument is illustrated by the testimony of the 1965 class representative, who stated to a co-investor in 1967, that Home-Stake "may have deteriorated into a Ponzi-like situation . . . ." However, he disclaimed *actual knowledge* until September, 1973, six months after the *Anixter* complaint was filed.

As a general rule, a "discovery" limitation period begins to run "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Trotter v. Int'l Longshoremen's and Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983). There is no conflict among

the circuits on this rule of interpretation of statutes of limitations.[5]

Federal courts have rejected the "actual discovery" standard advocated by Cross-Petitioners. In *NLRB v. Allied Prod. Corp.*, 548 F.2d 644, 651 (6th Cir. 1977), the court stated the general rule "that a limitation period begins to run 'when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation].' " (citations omitted) The "reasonable diligence" requirement is read into all statutes of limitation. *See Alcorn*, 878 F.2d at 1108; *Kropinski*, 853 F.2d at 956; *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988).

Under an objective standard, " 'discovery' means either actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation." *Azalea Meats v. Muscat*, 386 F.2d 5, 8-9 (5th Cir. 1967). This definition of the "discovery rule" has been specifically applied to the limitation periods of the 1934 Act. In *Rosenberg v. Hano*, 121 F.2d 818, 821 (3d Cir. 1941), the court interpreted Section 9(e) to require an investor "to use reasonable diligence toward discovering the fraud after the transaction is completed." In *Walck v. American Stock Exchange*, 687 F.2d 778, 792 (3d Cir. 1982), *cert. denied*, 461 U.S. 942 (1983), the three-year period in Section 9(e) was held to be a complete bar, regard-

---

[5] *Rivera-Muriente v. Agosto-Alicea*, 959 F.2d 349, 353 (1st Cir. 1992); *Santos v. Dist. Council of New York City*, 619 F.2d 963, 969 (2d Cir. 1980); *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991); *Alcorn v. Burlington N. R.R.*, 878 F.2d 1105, 1108 (8th Cir. 1989); *Alexander v. Beech Aircraft*, 952 F.2d 1215, 1226 (10th Cir. 1991); *Samples v. Ryder Truck Lines*, 755 F.2d 881, 887 (11th Cir. 1985); and *Kropinski v. World Plan Executive Council*, 853 F.2d 948, 956 (D.C. Cir. 1988).

less of the extent of plaintiffs' knowledge. Parenthetically, the court explained that the one-year discovery rule in Section 9(e) was triggered when "plaintiff discovered (or should have discovered) the wrong." 687 F.2d at 792. The court in *Goldenberg v. Bache & Co.*, 270 F.2d 675, 681 (5th Cir. 1959), considering Section 29(b) of the 1934 Act containing language similar to Section 9(e), ruled that the word "discovery" means "either actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation."[6]

Federal courts have interpreted state statutes of limitation with language similar to that in Section 9(e) and ruled that the word "discovery" includes constructive as well as actual discovery. In *Sade v. Northern Natural Gas Co.*, 483 F.2d 230, 235 (10th Cir. 1973) (applying Oklahoma law), the Court stated: "The phrase 'until the discovery of the fraud' does not necessarily mean until the party has actual notice of the fraud, and fraud is deemed to have been discovered when, on the exercise of reasonable diligence, it could, and should have been, discovered." It is settled law that the word "discovery" used in limitations statutes means "actual or constructive discovery."[7]

---

[6] The absence of "reasonable diligence" language was probably an oversight, and Section 9(e) should be read to include that language. H. Bloomenthal, SECURITIES LAW HANDBOOK, §25.02[11] at 941 (1991-92 ed.) and L. Loss, FUNDAMENTALS OF SECURITIES REGULATIONS at 991 (2d ed. 1988). See Congressional Record, Senate, May 7, 1934, at 8198, for the legislative history of the 1934 Amendment of Section 13 of the 1933 Act that was specifically intended to "conform" the limitation of the 1933 Act to the limitation periods of the 1934 Act; *see also Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987), for a discussion of the legislative history.

[7] *See, e.g., Duncan v. Leeds*, 742 F.2d 989, 991 (6th Cir. 1984) (applying Tennessee law); *Owens v. White*, 380 F.2d 310, 313 (9th

(Footnote continued on following page)

Cross-Petitioners' argument confuses subjective actual discovery with the duty to exercise due diligence. Actual knowledge is not the test. *Volk v. D. A. Davidson & Co.*, 816 F.2d 1406, 1417 (9th Cir. 1987). Contrary to Cross-Petitioners' claim, neither constructive discovery nor actual discovery of a cause of action has ever been interpreted by a court to be dependent upon a plaintiff's complete knowledge of all of the facts and circumstances concerning an alleged fraud. *See United States v. Kubrick*, 444 U.S. 111, 122-23 (1979). "Inquiry notice is triggered by evidence of the possibility of fraud; it does not require full exposition of the fraud itself." *Ebrahimi v. E. F. Hutton & Co.*, 852 F.2d 516, 523 (10th Cir. 1988). The limitation period commences when a plaintiff has knowledge sufficient to put him on notice of any alleged fraud, and "[does] not await [his] leisurely discovery of the full details of the alleged scheme." *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970).

Prior to the enactment of the federal securities laws, it was established that if a claimant had sufficient knowledge to put him on notice as to any alleged fraud, the statutory period began to run. Judge Learned Hand wrote "[a] man may not let time slip by while he learns whether his wrongs are to be measured by tens, or hundreds, or thousands." *Talmadge v. United States Shipping Board*, 54 F.2d 240, 244 (2d Cir. 1931). Words with a fixed legal or judicially settled meaning must be presumed to have

---

[7] *continued*

Cir. 1967) (applying Idaho law); *Sade v. Northern Natural Gas Co.*, 483 F.2d at 235 (applying Oklahoma law); *Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1367 (9th Cir. 1978) (applying California law); and *First Nat'l Bank of Bowie v. Fidelity & Cas. Co.*, 634 F.2d 1000, 1004-05 (5th Cir. Unit A Jan. 1981) (applying Texas law).

been used in that sense. *United States v. Merriam*, 263 U.S. 179, 187 (1923). Therefore, Section 9(e) must be interpreted to incorporate the principles of law that existed when that statute was enacted, including the principle that inquiry notice will commence the statutory limitation period.

Cross-Petitioners inaccurately construe several district court decisions to support their claim of a conflict with the Tenth Circuit. (Cr. Pet. 9, n. 6) The trial court in *Hauman v. Illinois Power Co.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,882 at 93,606 (C.D. Ill. 1991), considered the defendant's motion for summary judgment and ruled on the standards of proof necessary for summary judgment. *Hauman* was not addressing the level of proof necessary to establish actual discovery. *Hauman's* determination that Section 9(e) and *Lampf* require actual discovery is simply wrong.

Werner v. Satterlee, Stephens, Burke & Burke, 797 F. Supp. 1196, 1204-05 (S.D.N.Y. 1992) and the other district court cases relied on by Cross-Petitioners involved motions to dismiss. (Cr. Pet. 9) Those courts simply concluded that the one-year period in Section 9(e) turns on "discovery of the facts constituting the violation." None of those courts had the benefit of a factual record to determine whether the plaintiffs had actual or constructive knowledge.

Cross-Petitioners next turn to the congressional debates to support their conclusion that the one-year period commences upon actual discovery. (Cr. Pet. 10) However, this Court has cautioned against placing too much reliance on legislative debates. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). "[C]ontemporaneous remarks of a single legislator who sponsors a bill are not controlling in ana-

lyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 (1980). The key is consistency between what was said in the debates and the language of the statute finally adopted.

Cross-Petitioners only quote isolated statements from the debates on the 1934 Act, but fail to provide the full context from which they were drawn. Moreover, they fail to disclose that Senator Fletcher's comments about discovery of the fraud were made in support of an amendment for *reducing* the limitation period. 78 Cong. Rec. 8198 (1934). Senator King urged that the outer period of time for bringing suit be reduced even further. *Id.* He suggested that the outer limits, when suit could not be filed at all, regardless of discovery, should be no more than three or four years. *Id.* Senator Fletcher then remarked that "the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed." *Id. Lampf* is consistent with the plain language of Section 9(e) as well as the legislative history as a whole.

Cross-Petitioners urge this Court to grant review and to adopt an interpretation of Section 9(e) that would require proof of actual discovery. To do so would destroy the advantages of federal uniformity over the state borrowing doctrine. A standard of proof under Section 9(e) that requires actual discovery would have the effect of establishing a limitation period for each individual plaintiff. This would mean, in a class action suit, that there would be a separate limitation period for each class member.

The long-standing principle of inquiry notice is accepted by all circuits, and the Cross-Petitioners have demonstrated no conflict. Therefore, the Cross-Petitioners raise no issue that this Court need review.

II.

THE CROSS-PETITION DEMONSTRATES NO CONFLICT AMONG THE CIRCUITS, IS BASED PRIMARILY UPON FACTUAL ISSUES AND PRESENTS NO IMPORTANT FEDERAL OR CONSTITUTIONAL ISSUES REGARDING THE TENTH CIRCUIT'S DETERMINATION OF INQUIRY NOTICE UNDER SECTION 9(e).

Cross-Petitioners present a substantial part of their argument on their second and third questions by reference to their Petition in *Dennler v. Trippet*, No. 92-1003. The following response is, therefore, substantially the same as in the Brief in Opposition filed in No. 92-1003.

A. There Is No Conflict Among the Circuits.

Cross-Petitioners' second question is limited to the application of the one-year limitation period of Section 9(e) to Cross-Petitioners' Section 10(b) claims. Cross-Petitioners erroneously contend that the Tenth Circuit's opinion is in direct conflict with *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979). Cross-Petitioners misconstrue *Robertson* to hold that inquiry notice cannot be triggered by a "wholly distinct fraudulent scheme." To the contrary, the same circuit, in *Arneil v. Ramsey*, 550 F.2d 774, 781 (2d Cir. 1977), held that media coverage, regarding violations of the record keeping provisions of the securities laws, was sufficient to constitute inquiry notice of another independent fraud. *Robertson* does not overrule *Arneil*. *Robertson* discusses fraudulent concealment of a single underlying fraud. *Robertson*, 609 F.2d at 593.[8] Both the case

[8] Cross-Petitioners argue that only the second SEC fraud suit put them on inquiry notice of these claims. Prior to their petition No. 91-1340, raising some of the issues presented here, Cross-Petitioners argued that it was a *Wall Street Journal* article reporting

(Footnote continued on following page)

at bar and *Arneil* deal with two independent, actionable frauds. Therefore, *Robertson* is inapposite and not in conflict with the Tenth Circuit decision in this case.

B. Cross-Petitioners' Second Question Is Based Primarily Upon Factual Issues Fully Considered by the Tenth Circuit.

Cross-Petitioners have drafted their second question very narrowly to imply that the Tenth Circuit resolved the question of "inquiry notice" solely on the effect of the rescission offer. This is not an accurate statement of the basis of the Tenth Circuit's holding.

Factors such as market conditions, legal actions, or adverse or contradictory information are sufficient to place an investor on inquiry notice and to commence the limitation period. *See Gaudin v. KDI Corp.*, 576 F.2d 708, 712 (6th Cir. 1978); *Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975); *Hupp v. Gray*, 500 F.2d 993, 996-97 (7th Cir. 1974); and *Arneil*, 550 F.2d at 781, all cited with approval in *Robertson*, 609 F.2d at 587-89. Furthermore, newspaper articles may be considered in determining inquiry notice. *Kennedy v. Tallant*, 710 F.2d 711, 716 (11th Cir. 1983); *Berry Petroleum*, 518 F.2d at 410. Finally, investor sophistication is a significant factor to be considered with regard to events sufficient to constitute inquiry notice. *Arneil*, 550 F.2d at 781; *Jones v. Ford Motor Co.*, 599 F.2d 394, 399 (10th Cir. 1979).

---

[8] *continued*

Home-Stake's filing for reorganization which put them on inquiry notice. Obviously, Cross-Petitioners have changed the event that they claim triggered inquiry notice for purposes of manufacturing a perceived, but non-existent, conflict with *Robertson*.

The record before the Tenth Circuit demonstrated the Cross-Petitioners' constructive knowledge of the alleged fraud from, *inter alia*: (1) the inconsistencies between the prospectuses and the program books regarding income projections; (2) the check stubs and tax summaries which described "pro rev" as income other than from oil and gas production; and (3) the annual summaries of the status of the development in the prior programs which clearly demonstrated inconsistencies between Home-Stake's projections and actual development. Even if the Cross-Petitioners were not placed on inquiry notice on the date of their investment as a result of the inconsistencies between the prospectuses and program books, they were on at least inquiry notice from the date they received the first check stub or tax summary which reported their income as being from "other" than oil and gas production.

The voluntary payments, which Cross-Petitioners refer to as the "Home-Stake fraud," were designated by Home-Stake as "pro rev" or "program revenue" payments. These payments were not represented by Home-Stake as income from oil and gas production, as Cross-Petitioners argue. Rather, they were represented as income from sources "other" than from oil and gas production. Full disclosure of the source of pro rev payments was made by Norman C. Cross, Jr. to the IRS, which approved and allowed pro rev payments as costs in the years that the payments were made. Home-Stake also disclosed the pro rev payments by stating in the 1971 Prospectus filed with the SEC:

> Cash returned to Investors includes funds derived from production and a return upon their capital contributions to the Programs as payment for the use of the contributed funds by Home-Stake . . . In the case of the 1965 to 1969 Programs, inclusive . . . funds

derived from the latter sources have constituted virtually all of the net cash returned to Investors.

In December 1970, the SEC issued a formal Order of Investigation of the 1970 POC and, on February 10, 1971, filed a complaint in the district court charging Home-Stake, its officers and directors, and the 1970 POC with violation of the anti-fraud provisions of the federal securities laws. In April 1971, the Final Judgment of Permanent Injunction was entered. Furthermore, on April 30, 1971, the Rescission Offer Prospectus and a copy of the final judgment, describing the SEC fraud charges, were mailed to each of the investors in the 1970 POC. Two hundred seventy-nine investors accepted the rescission offer and received the return of their investments, plus accrued interest.

The 1971 Prospectus, effective November 3, 1971, and the 1972 Prospectus, effective October 11, 1972, also disclosed, to the 1971 and 1972 investors, details of the SEC fraud charges. In addition, six lawsuits were filed between June 1971 and January 1973 by various investors alleging that Home-Stake had violated the anti-fraud provisions of the federal securities laws. (App. 45a n. 39)

The Tenth Circuit held that these facts collectively constituted " 'great glowering clouds' . . . sufficient to put plaintiffs on notice that something was amiss" and were "enough of a 'storm warning' to start the clock as a matter of law." (App. 43a, 47a) The Tenth Circuit recognized that the three class representatives knew these facts, and noted that each admitted that they "made their own decisions based as much on tax considerations as investment concerns." (App. 44-46a)

Cross-Petitioners now ask this Court to find that constructive discovery could not have occurred prior to Sep-

tember, 1973. However, their suit for fraud was filed on March 30, 1973, *six months earlier*. Cross-Petitioners' argument that constructive discovery could first occur six months after actual discovery is incredible.

Independent of the question of when inquiry notice properly commenced, granting certiorari on the second question presented would also require this Court to consider an additional defect in the Cross-Petitioners' Section 10(b) claims, which arises from post-filing amendments to the class action complaints. The 1971 POC claims against Kothe & Eagleton and the first claims by the 1972 POC were added by amendment on May 24, 1974, more than one year after the original complaint in this action was filed and, therefore, are time-barred. (App. 47a)

The existence of constructive discovery depends upon facts unique to each case. *Robertson*, 609 F.2d at 591. As this Court has stated, it does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The question of when inquiry notice occurred is a fact-dependent issue peculiar to these Cross-Petitioners, and this Court "does [not] sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

C. No Important Federal or Constitutional Issues Are Presented.

Cross-Petitioners state that the Tenth Circuit's holding as to when inquiry notice occurred as a matter of law "flies in the face of common sense . . . and improperly invades the province of the jury." If anything "flies in the face of common sense," it is the jury finding that discovery of the fraud could not have occurred prior to

September, 1973, which ignores the fact that Cross-Petitioners had actual knowledge of the fraud and had already filed their securities fraud claims six months earlier.

Based upon the whole record, the Tenth Circuit correctly concluded that "a single question of law predominates our review." (App. 24a) This Court has long recognized that "if the evidence is uncontradicted and raises only a question of law," there is no violation of the Seventh Amendment right to a jury trial when an appellate court reverses and directs entry of judgment. *Tull v. United States*, 481 U.S. 412, 419 (1987); *Neely v. Martin K. Eby Constr.*, 386 U.S. 317, 321-22 (1967).

There is no usurpation of a jury function, nor is there a violation of the Seventh Amendment, where the material facts are undisputed and the court establishes, as a matter of law, that a statute of limitations bars the action. *Curry v. A. H. Robins Co.*, 775 F.2d 212, 217 (7th Cir. 1985).

The Tenth Circuit was correct in setting aside the jury findings and applying the standards of review set forth in *Black, Sivalls & Bryson v. Keystone Steel Fabrication*, 584 F.2d 946, 951 (10th Cir. 1978), because "both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943).

Cross-Petitioners state that the Tenth Circuit's opinion conflicts with "well-established principles governing appellate review of jury verdicts in securities law cases," citing *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984). However, *Mosesian* recognized that a statute of limitations question may be decided as a matter of law "when uncontro-

verted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Mosesian*, 727 F.2d at 877, citing *Kramas v. Sec. Gas & Oil*, 672 F.2d 766, 770 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982). Cross-Petitioners have not and cannot identify a conflict among the circuits. The Ninth Circuit in *Mosesian* cited cases from the Sixth and Seventh Circuits holding that this question may be decided as a matter of law. 727 F.2d at 878. The outcome in *Mosesian* is distinguishable from this case because the Ninth Circuit, in reversing the judgment notwithstanding the verdict, held that the verdict was "reasonable and [was] supported by substantial evidence." 727 F.2d at 879. The facts here do not support a similar conclusion.

The power of any court, trial or appellate, to direct entry of judgment notwithstanding a verdict, without violating the Seventh Amendment, is well established. *Neely*, 386 U.S. at 322. *See also* 5A J. Moore, J. Lucas, MOORE'S FEDERAL PRACTICE, ¶50.07[1] at pp. 50-61 through 50-64 (2d ed. 1992), and the citations therein. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 360, 363-64 (1962), and *Robertson*, 609 F.2d at 592, cited by Cross-Petitioners, are inapposite since the evidence relevant to the issue was controverted.

Cross-Petitioners' second issue does not raise any legal question on the appropriate standard for judgment notwithstanding the verdict, nor does it raise a constitutional question. Instead, this issue is fact-based, i.e., whether a review of the record establishes that there are no material fact questions which would preclude an appellate court from entering judgment. Fact questions are not an appropriate basis for granting certiorari. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951).

III.

THE DECISION OF THE TENTH CIRCUIT WITH RESPECT TO EQUITABLE ESTOPPEL IS NOT CONTRARY TO, NOR IN CONFLICT WITH, DECISIONS OF THIS COURT OR OTHER CIRCUITS.

This Court and the various circuits uniformly define equitable estoppel as it relates to statutes of limitation to require proof that a plaintiff knew of a cause of action and, because of reliance upon a defendant's acts, failed to file the known cause of action in a timely manner. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959); *Aldrich v. McCulloch Properties*, 627 F.2d 1036, 1043 n. 7 (10th Cir. 1980); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988).

Cross-Petitioners must rely upon a misconstruction of the distinction between equitable tolling and equitable estoppel to seek review of the Tenth Circuit holding. The distinction is explained in *Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 49-50 (2d Cir. 1985):

> Unlike equitable tolling, which is involved in cases where the plaintiff is ignorant of his cause of action because of the defendant's fraudulent concealment, equitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing his lawsuit. (citations omitted)

The facts enumerated by Cross-Petitioners do not support the application of equitable estoppel. Cross-Petitioners have never argued that they knew of their claims but delayed filing suit in reliance upon any acts or representations of the Cross-Respondents. Rather, Cross-Petitioners argue that the actions of some Cross-Respondents prevented them "from discovering" their claims, that quarterly pay-

ments from other than oil and gas production were made "to conceal the absence of program development and the lack of profitable operations," and that the rescission offer prospectus constituted an act of "concealment." Thus, Cross-Petitioners tacitly acknowledge that the facts of this case do not give rise to equitable estoppel. Cross-Petitioners deny knowledge of their claims until six months after the suit was filed, and, therefore, they cannot claim to have been fraudulently induced to forego filing a known claim.

Cross-Petitioners apparently seek to misconstrue the distinction between equitable tolling and equitable estoppel, recognizing the fact that equitable tolling will not extend the three-year period of repose under Section 9(e). *Cf. Summer v. Land & Leisure*, 664 F.2d 965, 968 (5th Cir. Unit B Dec. 1981), *cert. denied sub nom. Arthur Young & Co. v. Summer*, 458 U.S. 1106 (1982); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir. 1982).

The Tenth Circuit, in its initial decisions, correctly concluded that the 1964-1969 investors "were barred from suit by the three-year statute of repose" since the suit was not filed until March 30, 1973. (App. 39a) This Court acknowledged the significance of this language in Section 13 when it construed the three-year provision of Section 9(e) as a "period of repose" not subject to any "tolling principles." *Lampf*, 111 S.Ct. at 2781-82.

The Tenth Circuit's opinion is not in conflict with *Glus, Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978), *Katz v. Amos Treat & Co.*, 411 F.2d 1046 (2d Cir. 1969), or other cases cited by Cross-Petitioners. Those cases each involved statements by defendants that caused the plaintiffs not to file suit, even though plaintiffs knew of their claims before the limitations period elapsed. There, the courts applied traditional standards of equitable estoppel.

All circuits, which have considered the application of equitable estoppel to avoid the three-year limitation period of Section 13, have rejected the principle. *See Short v. Belleville Shoe Mfg. Co*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 501 U.S. ____, 111 S.Ct. 2887 (1991) (collecting cases). The Tenth Circuit's ruling is consistent with those decisions. (App. 32a n. 15, 38a-39a) Furthermore, the Tenth Circuit accurately noted that here the district court's decision (which is the same as the Cross-Petitioners' contention before this Court) "is recognized in the treatises as the 'sole exception' to the three-year absolute bar under section 13." (App. 32a n. 15) The rationale of Section 13 has been applied to Section 9(e) and affirmed by this Court in *Lampf*, when it construed the three-year provision as a "period of repose," not subject to any tolling principles. *Lampf*, 111 S.Ct. at 2781-82.

The statement by the Tenth Circuit that equitable estoppel is inapplicable "when the consequence operates to trump a clear outer limit intended by Congress" does not create the conflict claimed by Cross-Petitioners. The Tenth Circuit acknowledged that "there may be circumscribed settings in which the doctrine of equitable estoppel might apply to claims governed by Section 13." (App. 37a-38a) Harold S. Bloomenthal, cited and relied upon by the Cross-Petitioners, has commented on the Tenth Circuit's opinion in this particular case, and has noted that the Tenth Circuit's rejection of equitable estoppel is not inappropriate, since

> the issue had been commingled at the trial level with the issue of equitable tolling, and what the jury was asked to decide on the equitable tolling issue was whether the defendants "intended to and did thwart and defeat" the federal courts, the IRS and the SEC, all of which has nothing to do with equitable estoppel.

H. Bloomenthal, SECURITIES LAW HANDBOOK at 1056 (1991-92 ed.).

As noted in *Glus*, the application of equitable estoppel is to be determined upon the facts of each case. 359 U.S. at 234. The Tenth Circuit correctly held upon the facts of this case, that Cross-Respondents were not equitably estopped from asserting the statute of repose. The decision by the Tenth Circuit is consistent with *Glus* and with circuit decisions interpreting Section 9(e), Section 13 and similar statutes of limitation.

A review of the facts and evidence discloses a further defect in Cross-Petitioners' contentions. The Cross-Petitioners' statement of the case imputes to all Cross-Respondents the conduct or acts of every other party, regardless of when they occurred, and regardless of whose conduct or acts might be considered acts of estoppel. However, neither estoppel nor tolling operate vicariously against persons who are not parties or privy to the transactions from which the estoppel or tolling arose. *Eldred v. Bell Tel. Co.*, 119 U.S. 513 (1886); *Branson v. Wirth*, 84 U.S. (17 Wall.) 32 (1872); *Deery v. Cray*, 72 U.S. (5 Wall.) 795 (1866).

A grant of certiorari by this Court on the third question presented would require this Court to review the facts and evidence unique to the parties to these proceedings to determine if equitable estoppel has been properly rejected by the Tenth Circuit.

The factual issues were fully considered by the Tenth Circuit and further review of such factual issues is not an appropriate basis for certiorari. *Pittsburgh*, 340 U.S. at 503; *Johnston*, 268 U.S. at 227.

CONCLUSION

The Cross-Petition for writ of certiorari should be denied.

Respectfully submitted,

STAN P. DOYLE
JAMES C. THOMAS
DOYLE & HARRIS
P.O. Box 1679
Tulsa, Oklahoma 74101
(918) 743-1276
Counsel for
Kothe & Eagleton, Inc.

JACK L. MCNULTY
THOMAS M. AFFELDT
SAVAGE, O'DONNELL,
SCOTT, MCNULTY,
AFFELDT & GENTGES
601 S. Boulder, Suite 1100
Tulsa, Oklahoma 74119
(918) 599-9000
Counsel for
E.M. Kunkel

B. HAYDEN CRAWFORD
Counsel of Record
ROBERT L. BAINBRIDGE
KYLE B. HASKINS
CRAWFORD, CROWE &
BAINBRIDGE, P.A.
15 East Fifth St., Suite 1714
Tulsa, Oklahoma 74103-4365
(918) 587-1128
Counsel for
Wynema Anna Cross,
Executrix of the Estate
of Norman C. Cross, Jr.,
and Cross and Company

WALTER A. STEELE
WHITE AND STEELE, P.C.
1225 17th Street, Suite 2800
Denver, Colorado 80202
(303) 296-2828
Counsel for
E.M. Kunkel